

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of the)	CC Docket No. 96-98
Local Competition Provisions)	
of the Telecommunications Act of 1996)	

**COMMENTS OF KMC TELECOM, INC.
AND FOCAL COMMUNICATIONS CORP.**

KMC Telecom, Inc. and Focal Communications Corp. respectfully submit these comments in response to the Fourth Further Notice of Proposed Rulemaking in this proceeding.¹ KMC and Focal anticipate that other parties in this proceeding will fully articulate the legal and policy issues concerning the Commission establishing a program of usage restrictions on UNEs. KMC and Focal will only touch briefly in these initial comments on the legal and policy issues concerning establishment of usage restrictions on UNEs. Instead, KMC and Focal file these initial comments for the principal purpose of urging the Commission, if it adopts any restrictions on usage of UNEs, to assure that they are narrowly tailored and do not impose any substantial burdens on, and help to further, CLECs' business plans as full service providers of local, exchange access, voice and data services.

¹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-238, released November 5, 1999 ("FNPRM"). The Third Report and Order and Fourth Further Notice of Proposed Rulemaking was amended in a Supplemental Order in CC Dkt 96-98, FCC 99-370, released Nov. 24, 1999.

LEGAL AND POLICY CONCERNS TO UNE USAGE RESTRICTIONS

In the *Local Competition Order*, the Commission rejected ILEC arguments that there is anything in the statute or the legislative history that would lead it to conclude that permanent limitations on the use of UNEs would be lawful. At that time, the Commission stated that its finding that carriers may use UNEs for the provision of any telecommunications service is "compelled by the plain language of the 1996 Act" and that "the language of section(c)(3) . . . is not ambiguous."² The Commission considered all the same arguments that it now raises in the *FNPRM* when it originally interpreted the Act. Neither the Act nor the legislative history has changed since that time and there is simply no reason to read the statutory language differently.³

ANY RESTRICTIONS MUST BE NARROWLY TAILORED TO PRESERVE AND EXTEND CLECS' RIGHTS UNDER THE ACT TO PROVIDE THE FULL RANGE OF VOICE AND DATA TELECOMMUNICATIONS SERVICES

If for any reason the Commission determines that it would be lawful, and otherwise consistent with the goals of the Act, to impose some usage restrictions on use of combinations of network elements and the EEL, the Commission should assure that any such restrictions are narrowly tailored and do not impose any substantial burdens on CLECs business plans as full service providers of local, exchange access, voice and data services.

² *Local Competition Order* at ¶¶ 356, 359.

³ The Commission seeks comment on whether Section 251(g), which requires LECs to continue to provide exchange access and information access to IXC's and information service providers in accordance with existing restrictions and obligations until those restrictions and obligations are superseded by the Commission. There is absolutely nothing in that section, which places obligations on LECs to continue providing certain services that could be read as allowing LECs to circumvent the plain reading of Section 251(c) which requires the ILECs to provide UNEs for any telecommunications service.

KMC and Focal intend to fully participate in later stages of this proceeding to assure that any such restrictions, if the Commission chooses to adopt them, do not unduly infringe on CLECs' rights under the Act to use UNEs and combinations of them to provide any telecommunications service. For the purpose of these initial comments, KMC and Focal provide the following principles that should be observed in establishing any such restrictions.

ILECs must ensure that there will be no "hot-cut" performance issues for existing combinations. The Commission should make clear that where a CLEC requests a combination of network elements as UNEs that are already combined, such as through provision of special access service, that this change should represent no more than a billing change and that ILECs may not claim that a physical "hot cut" is necessary that could delay of provision of these combinations of UNEs.

Special access facilities may be converted to the EEL. The Commission should assure that all special access facilities may be converted to the EEL, regardless of when the special access facilities were first ordered, *i.e.* special access facilities ordered after the *UNE Remand Order* may be converted. CLECs must also be able to order the EEL in the first instance without first ordering, and converting from, special access.

The EEL must be made available to permit CLECs to serve ISPs. KMC and Focal are concerned that ILECs will attempt to extend their ongoing disagreement with CLECs over reciprocal compensation for ISP-bound traffic to this proceeding by seeking to prohibit use of the EEL by CLECs to serve ISPs. The Commission should provide that CLECs may use the EEL to provide service to ISPs even if the Commission otherwise considers service provided to ISPs as predominantly or exclusively interstate exchange access service.

ILECs must provide interconnection to remote switching modules and remote access concentrators. Some ILECs have refused to provide, or unreasonably delayed, interconnection on various spurious grounds to newer, more efficient kinds of equipment that combine some of the functions of 5ESS switches with advanced telecommunications functions. KMC and Focal are concerned that ILECs will use any usage restrictions established in this proceeding as an excuse to refuse to provide combinations of UNEs that interconnect with this equipment on the ground that they are not switches. Any usage restriction that uses switching as the test for acceptable usage of combinations of UNEs must make clear that interconnection of combinations of UNEs to this equipment is required.

No restrictions for Advanced Services. The Commission should assure that ILECs must provide combinations of UNEs without any restrictions for provision of advanced services regardless of whether any of these would be considered predominantly or entirely exchange access services.

Limited Duration. In the *Local Competition Order*, the Commission stated that it could "conceive of no circumstances under which the requirements that certain entrants [would pay non-TELRIC prices for the use of UNEs] . . . would be extended further."⁴ Accordingly, assuming that some restrictions would be lawful at all, the only way that the Commission could allow use restrictions at this time would be to make a finding that the transitional period must be further extended. Thus, by definition any use restrictions must be of very limited duration.

⁴ *Local Competition Order* at ¶ 725.

KMC and Focal reserve the right to make more specific suggestions and offer additional principles in subsequent stages of this proceeding.

CONCLUSION

For the foregoing reasons, KMC and Focal urge the Commission, if it adopts any permissible restrictions on use of combinations of unbundled network elements, to assure that any such restrictions are narrowly tailored and do not impose any substantial burdens on CLECs business plans as full service providers of local, exchange access, voice and data services.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Comments of KMC Telecom, Inc. and Focal Communications Corp. have been served by hand delivery to the persons on the attached list.


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